

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5847

April 7, 1998

REPORT TO THE COMMITTEE ON PUBLIC
SAFETY AND NEIGHBORHOOD SERVICES

PROPOSED TOBACCO ORDINANCE

INTRODUCTION

At the Public Services and Neighborhood Safety Committee meeting of February 4, 1998, the Committee directed the City Attorney's Office to draft an ordinance, based on City Attorney Report No. 98-4 (Jan. 29, 1998), and City Attorney Memorandum of Law No. 97-30 (Nov. 18, 1997), restricting tobacco advertising and sales. Copies of those documents are included as Attachments 1 and 2, respectively. The Committee directed the City Attorney's Office to draft the ordinance using the most restrictive options presented in its Report, in a format that would allow the Committee to select all or any of the individual provisions to include in an ordinance to be recommended to Council.

Attached to this Report is the proposed ordinance. For your reference and information, this Report includes notes concerning various sections of the proposed ordinance and identifies those sections that have been tested in court in other jurisdictions.

I. Definition References

The ordinance uses the following terms and definitions already contained in the San Diego Municipal Code.

"Arcade" is defined in Municipal Code section 33.1635 as "any establishment (other than a pool hall or billiard hall defined in Section 33.1610) open to the public with six or more games of skill or amusement defined in Section 33.1641 installed on the premises. An arcade includes any lawful business establishment not otherwise police regulated that installs six or more games of skill or amusement."

"Child care center" is defined in Municipal Code section 101.0101.0102 as "any licensed

REPORT TO THE COMMITTEE
ON PUBLIC SAFETY AND
NEIGHBORHOOD SERVICES

-2-

April 7, 1998

child care facility, other than a family day care home, including infant centers, preschools and school age extended day care facilities.” This definition is carried over in the new Land Development/ Zoning Code Update at section 141.0606.

“City” is defined in Municipal Code section 11.0210 as “the area within the territorial city limits of The City of San Diego and such territory outside of this City over which the City has jurisdiction or control by virtue of any Constitutional or Charter provisions, or any law.”

“Director” is defined in Municipal Code section 11.0210 as “the City Manager or any Department Directors including the following Departments: City Clerk, Planning, Development Services, Engineering, General Services, Animal Control, Health, Water Utilities, Park and Recreation, Neighborhood Code Compliance, Environmental Services and the Fire and Police Chiefs, and any of their designated agents or representatives.”

“Person” is defined in Municipal Code section 11.0210 as “any natural person, firm, joint venture, joint stock company, partnership, association, club, company, corporation, business trust, organization, or the manager, lessee, agent, servant, officer or employee of any of them or any other entity which is recognized by law as the subject of rights or duties.”

II. Additional Exceptions to Sign Restrictions in Section 58.0302

Proposed section 58.0302 (Advertising Restrictions) prohibits outdoor tobacco advertising except in specified commercial and industrial areas. In addition to the exceptions listed in section 58.0302(b) of the proposed ordinance, some ordinances for other cities already include the following exceptions, which could be added to the proposed ordinance:

(a) This section shall not apply to signs on businesses that sell cigarettes that identify the business by name.

(b) This section shall not apply to neon or electric signs at retail stores that promote a particular brand of cigarettes.

(c) This section shall not apply to signs on mass transit vehicles or cabs.

(d) This section shall not apply to signs adjacent to an interstate highway.

(e) This section does not apply to preexisting contracts, or contracts entered into within thirty days of the enactment of this section.

III. Land Development/Zoning Code Designations

The proposed ordinance refers to several zoning designations, both existing and as adopted in the new Land Development/Zoning Code Update.

A. Existing Zones: San Diego Municipal Code, Chapter X, Article 1, Division 4

The exception stated in section 58.0302(b)(1) excludes signs in the following commercial zones. These zones correspond to the new zones created by the Land Development/Zoning Code Update that are excluded by section 58.0302(b)(2). To the extent that these commercial zones include schools, playgrounds, recreation centers or facilities, child care centers, arcades, or libraries, the exception does not apply to signs within 1000 feet of those sites.

CBD	Central Business District (Municipal Code § 101.0433): consumer goods and services, high-density residential.
CA-RR	Area Shopping Center—Restricted Residential (Municipal Code § 101.0427.1): regional shopping centers.
C	General Commercial (Municipal Code § 101.0432): consumer goods and services, limited wholesaling and warehousing, apartments.
C(PCOZ)	General Commercial—Pedestrian/Commercial Overlay Zone (Municipal Code § 101.0458).
C-1	Commercial (Municipal Code § 101.0430): consumer goods and services, limited wholesaling and warehousing, apartments.
C-1(PCOZ)	Commercial—Pedestrian/Commercial Overlay Zone (Municipal Code § 101.0458).

The following industrial zones are excluded in section 58.0302(b)(1). Again, these zones correspond to the new zones created by the Land Development/Zoning Code Update that are excluded by section 58.0302(b)(2).

SR	Scientific Research (§ 101.0434)
M-IP	Manufacturing—Industrial Park (§ 101.0435.1)
M-LI	Manufacturing—Light Industrial (§ 101.0434.1)
M-SI	Manufacturing—Small Industry (§ 101.0435.3)
M-1	Manufacturing (§ 101.0437)
M-1A	Manufacturing (§ 101.0436)
M-1B	Manufacturing (§ 101.0435.2)
M-2	Manufacturing (§ 101.0441)
M-2A	Manufacturing (§ 101.0440)

REPORT TO THE COMMITTEE
ON PUBLIC SAFETY AND
NEIGHBORHOOD SERVICES

-4-

April 7, 1998

B. Land Development/Zoning Code Update

The new Land Development/Zoning Code Update creates the following commercial zones:

- CN Commercial—Neighborhood: retail and personal service uses in residential areas.
- CR Commercial—Regional: business/professional office, commercial service, retail, wholesale, and limited manufacturing uses. CR-1 serves commercial and residential uses; CR-2 serves non-residential uses.
- CO Commercial—Office: office space, limited retail, and medium to high density residential.
- CV Commercial—Visitor: tourist oriented business, recreation, and residential.
- CP Commercial—Parking: parking adjacent to commercial areas.
- CC Commercial—Community: community-serving commercial services, retail uses, and limited industrial uses. CC-1 allows commercial and residential uses. CC-2 does not include residential uses. CC-3 is for pedestrian-oriented commercial and residential uses. CC-4 allows heavy commercial uses and residential uses. CC-5 allows heavy commercial, limited industrial, and residential uses.

Not all of these new zones would be exempt from the new advertising prohibitions. Based on the different uses for each commercial zone, we have included the following zones in the exception to section 58.0302: CR-2, CC-2, CC-4, and CC-5. Again, to the extent that these commercial zones include schools, etc., the exception does not apply to signs within 1000 feet of those sites.

The industrial zones identified in section 58.0302(b)(2) are: Industrial—Park (IP); Industrial—Light (IL); Industrial—Heavy (IH); and Industrial—Small Lot (IS).

IV. Alternatives to Interior Display and Advertising Restrictions

A. Self-Service Displays

The ordinance prohibits self-service displays but exempts self-service for cartons or multi-packs, since the larger packs appear less likely to interest minors. Some ordinances prohibit all self-service displays. However, since minors are less likely to purchase cartons or multi-packs, including this exception more narrowly tailors the provision to minors.

B. Interior Advertising

As documented in the photographs provided with the last report, the posting of cigarette advertising below four feet and/or next to snack and candy displays where they are most

REPORT TO THE COMMITTEE
ON PUBLIC SAFETY AND
NEIGHBORHOOD SERVICES

-5-

April 7, 1998

noticeable to children is a pervasive problem. The ordinance proposes outlawing both of these practices. Alternatively, the ordinance could restrict advertising below three feet, or restrict such advertising only at the front of the store (e.g., within a specified distance from the front door or cash register). The sign restrictions contained in proposed section 58.0302 already prohibit the display of signs in doors and windows that are visible from the outside; the Council may consider this sufficient limitation, or adopt the more restrictive limitations in this section.

C. Parks

At the last hearing on this ordinance, Councilmember Wear asked whether “parks” have a sufficient nexus to minors to justify including them in the ordinance. Because the ordinance includes “playgrounds” and “recreational centers and facilities,” we have removed “parks” from section 58.0303. “Park” was defined as follows:

“Park” means any park, playground, square, avenue or grounds under the control, direction or management of the Parks and Recreation Department of the City of San Diego.

Any “park” that includes some play equipment will still be included under “playground.” However, not including “park” means that tobacco advertising billboards and signs would be permitted near a park without play equipment located in a commercial or industrial zone.

V. Enforcement and Remedies

As currently drafted, the ordinance provides both criminal penalties and civil remedies. Under Municipal Code section 12.0201, infractions are punishable by a maximum fine of \$250 for the first conviction and \$500 for the second conviction within a year; misdemeanors are punishable by a fine of not more than \$1000 and/or up to six months in jail. The proposed ordinance makes the first violation an infraction. Subsequent violations may be charged as a misdemeanor, at the discretion of the prosecuting authority.

Although the ordinance provides for the recovery of attorneys’ fees and costs to a prevailing party in a civil action, under California law, a prevailing defendant would also be entitled to recover fees and costs from the losing plaintiff. This risk decreases the likelihood of frivolous litigation, while still providing an avenue for private civil enforcement of legitimate violations. If this language were deleted, both sides would bear their own fees and costs, regardless of the outcome of the case.

REPORT TO THE COMMITTEE
ON PUBLIC SAFETY AND
NEIGHBORHOOD SERVICES

-6-

April 7, 1998

VI. Court-Tested Provisions

The overall approach of the proposed ordinance is similar to that taken by the City of Baltimore, Maryland. As discussed in more detail in the prior MOL, Baltimore's ordinance was challenged and upheld on appeal by the United States Court of Appeals for the Fourth Circuit. *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of City of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *aff'd on remand* by 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

Like the Baltimore ordinance, the preamble recognizes the City's substantial interest in discouraging and reducing illegal sales of tobacco to minors and the City's goal of preventing minors from breaking existing law by purchasing or possessing cigarettes. Section 58.0302 (Advertising Restrictions) is modeled after the Baltimore ordinance, including the "publicly visible locations" language. San Francisco recently adopted an ordinance with similar language.

Section 58.0303 (Location of Tobacco Advertising Inside Retail Establishments) has not been tested in court, but is drafted to meet the requirements for constitutionality as set forth in the *Penn Advertising* case. The restrictions in this provision apply only to tobacco retailers located within 1000 feet of areas children are likely to frequent; the provision is directed solely to the location, not the content, of the advertising; and the City has established a need for this restriction based on the frequency of advertising located below four feet and next to candy and snack displays, areas which are more likely to attract the attention of minors.

Section 58.0304 (Identification Required for Purchase of Tobacco Products), requiring identification checks for persons who appear to be under twenty-seven years of age, is already required by Federal Regulations.

Section 58.0305 (Sale and Distribution of Tobacco Products), limiting self-service displays, is a provision that has been included by many other California cities, including Coronado, El Cajon, Imperial Beach, and Poway. We are not aware of any court cases that have considered this provision.

Section 58.0306 (Distribution of Tobacco Samples or Promotional Items) is based on the proposed language presented by the American Lung Association at the PS&NS meeting of February 24, 1998. We are not aware of any court cases that have considered this provision.

Section 58.0307 (Posting of Signs Required Regarding Sales to Minors) reiterates requirements contained in existing California law, but adds the requirement that the type be at

REPORT TO THE COMMITTEE
ON PUBLIC SAFETY AND
NEIGHBORHOOD SERVICES

-7-

April 7, 1998

least one-half inch in height.¹ Similar provisions have been included by Coronado (one-half inch type), El Cajon (one-quarter inch type), Imperial Beach (one-quarter inch type), and Poway (one-quarter inch type). We are not aware of any court cases that have considered this provision.

Section 58.0308 (Extensions for Compliance) has not, to our knowledge, been tested by any court. This provision is designed to assist any business owner who may need additional time to comply with the ordinance.

Section 58.0309 (Enforcement), like the Baltimore ordinance, provides for enforcement using criminal penalties. The Baltimore ordinance provides for misdemeanor fines which are similar to fines for an infraction in San Diego. The new section also provides for injunctive relief and a private right of action, similar to those provided in other Municipal Code provisions within chapter V, article 8.

Respectfully submitted,

CASEY GWINN
City Attorney

CLG:jrl:(043.1)
RC-98-9

C:\dmautop\temp\147.wpd

¹ ONE-QUARTER INCH TYPE;
ONE-HALF INCH.